Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	
Open Video Systems	)	

PETITION FOR CLARIFICATION

U S WEST, Inc. ("U S WEST"), through counsel, and pursuant to Section 1.429 of the Federal Communications Commission's ("Commission") Rules,[1] hereby requests that the Commission clarify certain portions of its Second Report and Order[2] on Open Video Systems (or "OVS").

I. INTRODUCTION AND SUMMARY

As a whole, the OVS Order is quite clear and reflects the intent of Congress in adopting the Telecommunications Act of 1996.[3] Congress intended that OVS be something quite different from video dialtone, and the Commission's OVS Order

[1] 47 CFR § 1.429. See also In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, Order, FCC 96-256, rel. June 7, 1996.

[2] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, Second Report and Order, FCC 96-249, rel. June 3, 1996 ("OVS Order").

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

reflects this intent. The OVS Order, in combination with a reasonable set of cost allocation rules, should offer local exchange carriers ("LEC"), cable operators, and other video program providers sufficient incentive to give OVS serious consideration as an alternative means of delivering video programming to the home.[4]

As with any order as comprehensive as the OVS Order, the Commission did not address a few issues with sufficient specificity to resolve all outstanding questions. As such, U S WEST requests clarification of the following items: (1) that cable operators are permitted to become OVS operators upon the termination of existing franchise agreements; (2) that no sanctions will be applied to OVS operators if proper notice is given to alleged violators of the sports exclusivity, network non-duplication, and syndicated exclusivity rules; (3) that the statutory non-discrimination requirement in Section 653(b)(1)(E)(i) is satisfied if all OVS video program providers are displayed in a non-discriminatory manner in an introductory guide or menu, and all programming is equally accessible at the initial navigational level; and (4) that OVS operators may require that in lieu of franchise fees be included as a separate item on subscriber bills of all OVS video program providers.

[4] The importance of reasonable cost allocation rules for OVS cannot be overstated. By itself, the OVS Order is not "sufficient" to induce landline competition to existing cable systems. Competition will evolve only in the presence of reasonable cost allocation rules.

II. THE COMMISSION SHOULD CLARIFY THAT CABLE OPERATORS ARE PERMITTED TO BECOME OVS OPERATORS UPON THE TERMINATION OF EXISTING CABLE FRANCHISE AGREEMENTS

The Commission found that it served the public interest to allow entities other than LECs to become OVS operators.[5] The Commission limited this finding with respect to cable operators and found that the public interest would be served only in those cases where a cable operator was subject to "effective competition" in its franchise area. This finding appears to be based primarily on the Commission's view that Section 653(a)(1) of the 1996 Act could not be construed to disrupt or affect the terms of existing franchise agreements or other contractual agreements.[6]

U S WEST agrees with the Commission's findings and interpretation of the 1996 Act with respect to cable operators with existing franchise agreements.[7] What is left unsaid in the OVS Order is whether cable operators have a right to become OVS operators upon the termination of existing franchise agreements.[8] U S WEST believes that cable operators should have this option. Clearly, the contractual concerns that formed the basis of the Commission's finding would not apply upon termination of franchise agreements. Furthermore, in large metropolitan areas it is

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[5] OVS Order ¶ 12.

[6] Id.

[7] Clearly, the Commission's OVS Order permits a cable operator to select the option to become an OVS operator in other areas where it does not hold a franchise, including areas adjacent to its franchise area.

[8] Most likely, franchise agreements would be terminated in one of three ways: 1) by expiration at the end of the term of the agreement; 2) by mutual agreement of the local franchise authority and the cable operator; or 3) by one party exercising its rights under applicable default provisions.

quite possible that an entity may be a cable operator in one municipality (i.e., franchise area) and an OVS operator in other parts of the respective metropolitan area. The Commission should not adopt a rule which would prevent such an entity from converting its cable operation to an Open Video System upon termination of its franchise agreement.

As such, the Commission should clarify its OVS Order to state that cable operators have the option to become OVS operators upon the termination of existing franchise agreements, regardless of whether effective competition exists in the respective franchise area.

III. THE COMMISSION SHOULD CLARIFY THAT NO SANCTIONS WILL BE APPLIED TO OVS OPERATORS IF PROPER NOTICE IS GIVEN TO ALLEGED VIOLATORS OF THE SPORTS EXCLUSIVITY, NETWORK NON-DUPLICATION, AND SYNDICATED EXCLUSIVITY RULES

The 1996 Act directs the Commission to adopt rules governing the application of sports exclusivity, network non-duplication, and syndicated exclusivity rules to Open Video Systems.[9] In the OVS Order, the Commission indicated that it would "hold open video system operators responsible for compliance" with these rules.[10] In doing so, the Commission required that television stations must notify OVS operators of the exclusive or non-duplication rights being exercised and that OVS operators must make all such notices immediately available

[9] 1996 Act, 110 Stat. at 122 § 653(b)(1)(D).

[10] OVS Order ¶ 203.

to the appropriate video programming providers on their systems.[11] These are reasonable requirements which are easily understood. The Commission goes on to state that it would not expect to impose sanctions on OVS operators for violations if the OVS operator gave proper notice to program providers and "took prompt steps to stop the distribution of the infringing program."[12]

The Commission provided no guidance on what it considered to be "prompt steps." The OVS Order implies that a notice of a violation is the equivalent of a violation. It is not at all clear that this is always the case with respect to disputes over exclusivity and non-duplication. The Commission should either clarify what steps the OVS operator should take in the case of an alleged violation of these rules or clarify that sanctions will not be imposed on an OVS operator if proper notice is given to program providers allegedly violating these rules. No purpose is served by putting an OVS operator in the middle of a dispute between an OVS video program provider and a television station. Such an approach exposes an OVS operator to subsequent damage claims from both OVS video program providers and television stations with no offsetting benefits to the OVS operator. It is a "no-win" situation for the OVS operator which can be avoided easily by placing the compliance burden where it rightly belongs -- on the alleged violator, the video program provider.

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[11] Id. ¶ 204.

[12] Id.

IV. THE COMMISSION SHOULD PROVIDE FURTHER GUIDANCE ON THE REQUIREMENTS OF SECTION 653(b)(1)(E)(i) WHEN MULTIPLE NAVIGATION SYSTEMS ARE EMPLOYED TO SELECT PROGRAMMING

Section 653(b)(1)(E)(i) of the 1996 Act prohibits an OVS operator:

> from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers.[13]

In promulgating rules to implement this Section of the 1996 Act, the Commission assumed that a single navigational device would be used by subscribers to select programming.[14] It is highly likely that multiple navigational systems will be employed as digital/interactive capabilities evolve. OVS operators and OVS program packagers should not be placed in the position of trying to guess what the Commission's rules will be when multiple navigational systems are used. Specialized electronic program guides and navigational systems are expensive to develop, and program packagers will be reluctant to do so if they have to give "equal billing" to competitive OVS program providers. Furthermore, with subscription-only programming, customers (i.e., subscribers) will not be able to access the programming of other OVS program packagers in the absence of prior authorization, regardless of whether the programming appears on a specialized navigational system.

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[13] 1996 Act, 110 Stat. at 122-23 § 653(b)(1)(E)(i).

[14] OVS Order ¶ 224.

The Commission should clarify that the non-discrimination requirement of Section 653(b)(1)(E)(i) is satisfied if all programming providers on the Open Video System are displayed in a non-discriminatory manner in an introductory guide or menu and all programming is equally accessible at the initial navigational level (e.g., cable-ready TV set). Individual programming packagers should be permitted to develop specialized menus/guides and navigational devices which display only their programming. Such an approach would satisfy the intent of the 1996 Act while still providing program packagers with the incentive to develop and deploy specialized programming. Subscribers should not be forced to view advertising or listings for programs to which they have not subscribed and which, therefore, are not immediately available for viewing.

V. THE COMMISSION SHOULD CLARIFY THAT OVS OPERATORS MAY REQUIRE THAT IN LIEU OF FRANCHISE FEES BE INCLUDED AS A SEPARATE ITEM ON SUBSCRIBER BILLS OF ALL OVS PROGRAM PROVIDERS

In implementing Section 653(c)(2)(B) of the 1996 Act, the Commission found that in lieu of franchise fees should be assessed on the gross revenues of an Open Video System.[15] This included the gross revenues of an OVS operator and its affiliates (including subscriber revenues and carriage revenues) but excluded revenues collected by unaffiliated program providers from their subscribers and advertisers.[16] While at first glance this approach appears to disadvantage OVS

[15] Id. ¶ 220.

[16] Id.

providers and their affiliates vis-à-vis unaffiliated video program providers delivering programming over the same Open Video System, this may or may not be true. What is left unsaid in the OVS Order is whether OVS operators will be able to recover in lieu of franchise fees from all subscribers using an OVS on a pro rata basis or if these fees will be levied only on an OVS operator and its subscribers. Clearly, Section 653(c)(2)(B) of the 1996 Act allows OVS operators to "designate that portion of a subscriber's bill attributable to the [in lieu of franchise] fee . . . . as a separate item on the bill."[17] U S WEST believes that a reasonable interpretation of this statutory language would allow OVS operators to include a portion of the in lieu of franchise fee on the bills of all subscribers receiving video programming over a given Open Video System.

The Commission should clarify that OVS operators are permitted to recover in lieu of franchise fees on a pro rata basis from all subscribers receiving video programming over an open video system -- not just from those subscribers receiving programming directly from the OVS operator or its affiliates. Such a clarification would be in concert with Congress' intent "to ensure competitive parity among video providers"[18] and would mirror the cable industry's assessment and collection of franchise fees.

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[17] 1996 Act, 110 Stat. at 123-24 § 653(c)(2)(B).

[18] 104th Congress, 2d Session, Conference Report on S. 652 at 178.

VI. CONCLUSION

U S WEST urges the Commission to clarify its OVS Order as discussed in the foregoing comments.

Respectfully submitted,

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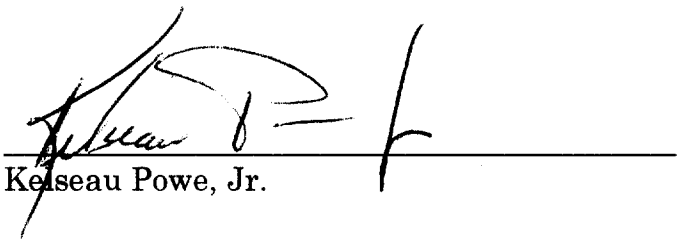
July 5, 1996

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr.. do hereby certify that on this 5th day of July, 1996, I have caused a copy of the foregoing **PETITION FOR CLARIFICATION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list



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